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In the Supreme Court of the State of Utah

LA VAR PETERSON,

Plaintiff and Petitioner

vs.

MARRINER M. MORRISON,

District Judge,

Defendant and Respondent.

FILED

OCT 28 1948

CLERK, SUPREME COURT, UTAH

Brief for

Golden Peterson,

et al.

PLAINTIFF'S BRIEF

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~~PLAINTIFF'S BRIEF~~

STATEMENT AND ARGUMENT

The petition for an alternative writ of mandate in this matter is based upon an erroneous conception of the subject matter of the litigation.

The original Complaint was filed in May of 1942. It is alleged, in paragraph 5, that John Charles Peterson took advantage of the plaintiffs in securing title to

“The Southwest Quarter of the Northwest Quarter of Section 2, Township 14 North, Range 8 West, Salt Lake Meridian

Together with 119 shares of stock of the Curlew Irrigation Company.”

The prayer was that he be adjudged and decreed to hold in trust for the plaintiffs and all of the heirs of the said Anton L. Peterson

The Southwest Quarter of the Northwest Quarter of Section 2, Township 14 North, Range 8 West, Salt Lake Meridian, and

further that:

“The said John Charles Peterson be required by order of this court to make a full and complete report and accounting of all moneys and properties of every character received from these plaintiffs and other heirs of said Anton L. Peterson, who join herein and that judgment be entered against him in favor of the said heirs for such as the court may find in equity and good conscience to be held in trust.”

By an Amended and Supplemental Complaint, it is alleged that the said John Charles Peterson used money received from Leon Fonnesbeck for the purchase or redemption of the land above described which he took in the name of the defendant Maria Peterson. By a Second Amended and Supplemental Complaint, it was alleged that Maria Peterson conveyed to

LaVar Peterson

"The Southwest Quarter of the Northwest Quarter, Section 2" as above described, for the consideration of \$1500.00. That the deed was filed for record and recorded in Book 47 of Deeds, 605, and further that a mortgage was given for \$1500.00 to secure payment of the purchase price of the property, and it was prayed that the deed from Maria Peterson to LaVar Peterson and the mortgage, giving book and page of each, be adjudged and decreed to be void and that the title of the property be decreed to be clear of all liens and encumbrances.

The Answer to the original Complaint sets up the purchase of the certificate of sale, by John Charles Peterson, the taking of a Sheriff's Deed upon the certificate of sale describing the land and including "119.81 shares of stock in the Curlew Irrigation Company". The book and page of the record of the deed is also given. It is alleged that Maria Peterson is the absolute owner of the real estate described

"Together with 119.81 shares of the capital stock of the Curlew Irrigation and Reservoir Company of Utah represented by certificates No.'s 229 and 230."

Attached to the Answer is a copy of the Sheriff's Deed describing the land and the certificates of stock.

Attached also is a Petition for Distribution of the Estate of Anton L. Peterson in which he described the land together with 119.81 shares of the capital stock of the Curlew Irrigation and Reservoir Company. There is also attached a Quit-Claim

Deed from Elizabeth Ann Peterson and others to the

Southwest Quarter of the Northwest Quarter of Section 2, Township 14 North, Range 8 West, Salt Lake Meridian

"Together with all water rights thereto belonging."

The Decree of the Court distributing to John Charles Peterson the same real estate and the same water rights described as 119.81 shares of the capital stock of the Curlew Irrigation and Reservoir Company is attached.

LaVar Peterson and wife answered the Amended and Supplemental Complaint describing the land and giving the book and page of the recorded deed as alleged in the Amended and Supplemental pleading.

The subject matter of the litigation, to-wit: The land and the water rights are described in the pleadings of the plaintiff and of the defendants time and time again.

As set up in the Answer filed by Golden Peterson et al., the original certificates 229 and 230 were lost, at least were not produced for transfer notwithstanding which other certificates were issued and outstanding. It was further made to appear by the Answer that the water was appurtenant to the land and had been so treated for upwards of 75 years.

ARGUMENT

The subject matter of the litigation was the land and the water.

At the time of the filing of the Complaint and until the amendment of Utah Code 100-1-10, the water was properly transferred with the land and if not by deed it passed as being appurtenant to the real estate described. The law was then as stated in

East River Bottom Water Company vs. Boyce, 102 U. 149, 128 P. 2d 277

The statute was amended, Laws of Utah, 1945. The transactions covered by the litigation took place before the amendment of the statute. Counsel has no doubt assumed that the statute was retroactive and hence a decree setting aside the deed to LaVar Peterson would be a nullity as to the water rights, because the clause,

"Together with 119 shares of water stock in Curlew Irrigation and Reservoir Company"

would be a transfer of water rights by deed and not by stock certificates.

Had the conveyance been made after '45, when the statute took effect and had it been to an innocent purchaser, possibly some consideration could be given to such a contention.

Counsel sought to secure findings and decree to the effect that Maria Peterson, at the time the Answer was sworn to, on

the 2nd day of September, 1942, was the owner of the land and certificates No. 229 and 230 notwithstanding she had on the 18th day of May, 1942, conveyed the property to her son, LaVar Peterson. If the deed to her son had been valid, she would not have been the owner of the property. At all events, she characterized the land and water stock as the subject matter of the litigation. Even though the plaintiff's pleadings were inadequate and they were not, so far as the water stock is concerned, the deficiency would have been supplied by the Answers. An estoppel against the plaintiff in this proceeding arises because of the pleadings filed and the evidence given in support of them. They all designate as the subject matter of the litigation the land and the water rights whether represented by certificates or whether passing by deed of conveyance under the laws prior to March, 1945.

THERE IS AND CAN BE NO SHOWING THAT THE DISTRICT COURT WILL NOT COMPLY WITH THE MANDATE OF THIS COURT.

There is another reason why this proceeding cannot be sustained. The District Judge has not acted and there can be indulged no conclusion as to how he will act in the matter of entering a Decree in harmony with the opinion of this court.

If he sets aside the deed from Maria Peterson to LaVar Peterson, as directed by this court, he sets aside the transfer

of the water because the water is specifically covered by the deed. The deed cannot be sustained as to the water and at the same time be set aside as to the land. The court is directed, I take it, to set aside the mortgage given by LaVar Peterson and in doing so, the court must necessarily set aside the transfer of the water because the mortgage covers the land and the water. They both became and now are inseparable. This court has said that

“The court’s finding that the trust money was used to repurchase the property would permit the plaintiffs to follow the property through its change in form. Maria Peterson would accordingly hold the property in trust for the plaintiffs and unless LaVar Peterson obtained greater or additional rights against the plaintiff, the judgment cannot be sustained.”

and again

“Under the facts of this case we hold all payments made by LaVar were made with notice of the claims of the plaintiffs.”

and further:

“The judgment is reversed with directions to the trial court to enter judgment in conformity with this opinion.”

The court can do nothing and conform to the opinion of this court except to treat the subject matter of the litigation as the property described in the assignment of the certificate of sale, the Sheriff’s Deed to Maria Peterson and the deed from Maria Peterson to LaVar Peterson. It cannot be made to appear to the court that the District Court was intending

to do anything except to conform strictly with the opinion of this court as he understood it.

The protection of the subject matter described in the deed to be set aside pending the entry of a judgment as directed by this court cannot be treated as a departure from the judgment of this court even though it necessitates the entry of an injunctive order against the plaintiff who clearly intended to put the water beyond the reach of the long arm of the court as the defendants have heretofore attempted.

Respectfully submitted,

J. D. SKEEN

Attorney for Golden Peterson, et al.